

## State Programs -- Preamble

### State Organic Programs

The Act provides that each State may implement an organic program for agricultural products that have been produced and handled within the State, using organic methods that meet the requirements of the Act and these regulations. The Act further provides that a State organic program (SOP) may contain more restrictive requirements for organic products produced and handled within the State than are contained in the National Organic Program (NOP). All SOP's and subsequent amendments thereto must be approved by the Secretary.

A State may have an SOP but not have a State certifying agent. A State may have a State certifying agent but no SOP. Finally, a State may have an SOP and a State certifying agent. In all cases, the SOP's must be approved by the Secretary. In all cases, the State certifying agent must apply for and receive accreditation to certify organic production or handling operations pursuant to subpart F.

In States with an approved SOP, the SOP's governing State official is responsible for administering a compliance program for enforcement of the NOP and any more restrictive requirements contained in the SOP. The SOP governing State officials may review and investigate complaints of noncompliance involving organic production or handling operations operating within their State and, when appropriate, initiate suspension or revocation of certification. The SOP governing State officials may also review and investigate complaints of noncompliance involving accredited certifying agents operating within their State. They must report the findings of any review and investigation of a certifying agent to the NOP Program Manager along with any recommendations for appropriate action. States that do not have an SOP will not be responsible for compliance under the NOP, except that an accredited State certifying agent operating within such State will have compliance responsibilities under the NOP as a condition of its accreditation.

The sections covering SOP's, beginning with section 205.620, establish: (1) the requirements for an SOP and amending such a program and (2) the process for approval of an SOP and amendments to the SOP's. Review and approval of an SOP will occur not less than once during each 5-year period. Review related to compliance matters may occur at any time.

### Description of Regulations

#### State Organic Program Requirements

A State may establish an SOP for production and handling operations within the State that produces and handles organic agricultural products. The SOP and supporting documentation must demonstrate that the SOP meets the requirements for organic programs specified in the Act.

An SOP may contain more restrictive requirements governing the production and handling of organic products within the State. Such requirements must be based on environmental conditions or specific production or handling practices particular to the State or region of the United States, which necessitates the more restrictive requirement. More restrictive requirements must be justified and shown to be consistent with and to further the purposes of the Act and the regulations in this part. Requirements necessitated by an environmental condition that is limited to a specific geographic area of the State should only be required of organic production and handling operations operating within the applicable geographic area. If approved by the Secretary, the more restrictive requirements will become the NOP regulations for organic producers and handlers in the State or applicable geographical area.

of the State. All USDA-accredited certifying agents planning to operate within a State with an SOP will be required to demonstrate their ability to comply with the SOP's more restrictive requirements.

No provision of an SOP shall discriminate against organic agricultural products produced by production or handling operations certified by certifying agents accredited or accepted by USDA pursuant to section 205.500. Specifically, an SOP may not discriminate against agricultural commodities organically produced in other States in accordance with the Act and the regulations in this part. Further, an SOP may not discriminate against agricultural commodities organically produced by production or handling operations certified by foreign certifying agents operating under: (1) standards determined by USDA to meet the requirements of this part or (2) an equivalency agreement negotiated between the United States and a foreign government.

To receive approval of its SOP, a State must assume enforcement obligations in the State for the requirements of this part and any more restrictive requirements included in the SOP and approved by the Secretary. Specifically, the State must ensure compliance with the Act, the regulations in this part, and the provisions of the SOP by certified production and handling operations operating within the State. The SOP must include compliance and appeals procedures equivalent to those provided for under the NOP.

An SOP and any amendments thereto must be approved by the Secretary prior to implementation by the State.

### **State Organic Program Approval Process**

An SOP and subsequent amendments thereto must be submitted to the Secretary by the SOP's governing State official for approval prior to implementation. A request for approval of an SOP must contain supporting materials that include statutory authorities, program descriptions, documentation of environmental or ecological conditions or specific production and handling practices particular to the State which necessitate more restrictive requirements than the requirements of this part, and other information as may be required by the Secretary. A request for amendment of an approved SOP must contain supporting materials that include an explanation and documentation of the environmental or ecological conditions or specific production practices particular to the State or region, which necessitate the proposed amendment. Supporting material also must explain how the proposed amendment furthers and is consistent with the purposes of the Act and the regulations in this part.

Each request for approval of an SOP or amendment to an SOP and its supporting materials and documentation will be reviewed for compliance with the Act and these regulations. Within 6 months of receiving the request for approval, the Secretary will notify the SOP's governing State official of approval or disapproval. A disapproval will include the reasons for disapproval. A State receiving a notice of disapproval of its SOP or amendment to its SOP may submit a revised SOP or amendment to its SOP at any time.

### **Review of State Organic Programs**

SOP's will be reviewed at least once every 5 years by the Secretary as required by section 6507(c)(1) of the Act. The Secretary will notify the SOP's governing State official of approval or disapproval of the program within 6 months after initiation of the review.

### **State Organic Programs - Changes Based on Comments**

This portion of subpart G differs from the proposal in several respects as follows:

(1) Publication of SOP's and Consideration of Public Comments. Some commenters assert that the USDA should not publish SOP provisions for public comment in the Federal Register. These commenters argued that it is not appropriate for the NOP to have nonresidents commenting on a particular State program as nearly all States have a mechanism to ensure full public participation in their regulation promulgation. They believe the comment process set forth in the proposed rule is a redundant and unacceptable intrusion on State sovereignty.

We will not publish for public comment the provisions of SOP's under review by the Secretary in the Federal Register. We have removed the provision from this final rule, described in section 205.621(b), requiring the Secretary to publish in the Federal Register for public comment a summary of the SOP and a summary of any amendment to such a program. Alternatively, we will announce which SOP's are being reviewed through the NOP website. The NOP will issue public information notices that will announce each approved SOP and any approved amendments to an existing State program. The notices will identify the characteristics of the approved State program that warranted the more restrictive organic production or handling requirements. We also will include a summary of the new program on the NOP website.

(2) NOP Oversight of SOP's. Several commenters stated that, in the proposed rule, the provisions did not provide a comprehensive description of organic programs operated by States that would be under NOP authority. Some commenters implied that the proposed rule would only include States with organic certification programs, while other commenters inquired whether the sections 205.620 to 205.622 included other SOP activities beyond certification.

To address the commenters' concerns, we have modified the section heading by adding the term, "organic," and removing the term, "certification," from the description and definition of SOP's. We have taken this action to clarify that, while certification is one component of the requirements, it does not define the extent of evaluation of State programs that will be conducted by the NOP. SOP's can choose not to conduct certification activities under their existing organic program. State programs whose provisions fall within the scope of the eleven general provisions described in the Act (7 U.S.C. 6506) will require Departmental review.

States may conduct other kinds of organic programs that will not need review and approval by the NOP. Examples of these other programs may include: organic promotion and research projects, marketing; transition assistance or cost share programs, registration of State organic production and handling operations, registration of certifying agents operating within the State, or a consumer referral program. The NOP will not regulate such State activities. Such programs may not advertise, promote, or otherwise infer that the State's organic products are more organic or better than organic product produced in other States. Such programs and projects would be beyond the scope of this national program and will not be subject to the Secretary's review.

### **State Organic Programs - Changes Requested But Not Made**

(1) Limitations on SOP More Restrictive Requirements. Commenters expressed concern that limiting a State's ability to craft a regulation designated as a more restrictive requirement to environmental conditions or specific production and handling practices would hinder the ongoing development of SOP's. They were concerned that any State legislation modifying

the SOP would need to be preapproved by the Secretary.

We have retained the provision limiting the scope of more restrictive requirements States can include in their organic program as described in section 205.620(c). We believe the language contained in the provision is broad enough to facilitate the development of SOP's without hindering development or State program implementation and enforcement. Section 6507(b)(1) of the Act provides that States may establish more restrictive organic certification requirements; paragraph (b)(2) establishes parameters for those requirements. More restrictive SOP requirements must: further the purposes of the Act, be consistent with the Act, not discriminate against other State's agricultural commodities, and be approved by the Secretary before becoming effective. We expect that a State's more restrictive requirements are likely to cover specific organic production or handling practices to address a State's specific environmental conditions. The Secretary will approve State's requests for more restrictive State requirements that are consistent with the purposes of the Act. However, we believe requests from States for more restrictive requirements will be rare. Although SOP's can impose additional requirements, we believe States will be reluctant to put their program participants at a competitive disadvantage when compared to producers and handlers in other States absent compelling environmental conditions or a compelling need for special production and handling practices. While preapproval of State legislation modifying an existing SOP is not required, the NOP envisions a close consultation with States with existing programs to ensure consistency with the final rule.

(2) SOP Enforcement Obligations. Some commenters expressed concern about States having adequate resources available to implement enforcement activities that they are obligated to conduct under the NOP. A few of these commenters argue that the enforcement obligation will result in their State programs being discontinued. A few commenters cited a lack of federal funding to support State enforcement obligations and suggested the NOP provide funding for enforcement activities.

The proposed rule indicated that States with organic programs must assume enforcement obligations for this regulation within their State. We have retained this enforcement obligation in section 205.620(d). Many States currently have organic programs with the kind of comprehensive enforcement and compliance mechanisms necessary for implementing any State regulatory program. Assuming those enforcement activities are consistent with the NOP, this final rule adds no additional regulatory burden to the SOP's. The costs associated with the enforcement activities of an approved SOP should be similar to the enforcement costs associated with the existing State program. Additional clarification of SOP enforcement obligations is in the Accreditation, Appeals, and Compliance preamble discussions.

(3) SOP Evaluation Notification Period. A few commenters indicated that the SOP review and decision notification period described in section 205.621(b) of the proposed rule could hinder a State's ability to develop or implement an SOP. These commenters cited potential cases in which particular States have requirements for regulatory promulgation that must occur within 6 months under a State legislative session that is held once every 2 years. These commenters suggested the NOP should reduce the notification time to 1 to 3 months.

We disagree with the commenters. In the proposed rule in section 205.621(b), the Secretary is required to notify the SOP's governing State official within 6 months of receipt of submission of documents and information regarding the approval of the SOP. We have retained this time period. We will review SOP applications as quickly as possible and will endeavor to make decisions in less than 6 months whenever possible. However, some SOP's may be very complex and require more review time. The NOP envisions working closely with the States and State officials to ensure a smooth transition to the requirements of this final rule.

## State Organic Programs - Clarifications

(1) Discrimination Against Organic Products. Several commenters requested the addition of a provision prohibiting an SOP from discriminating against agricultural commodities organically produced in other States. Discrimination by a State against organically produced agricultural products produced in another State is prevented in two ways. First, any organic program administered by a State must meet the requirements for organic programs specified in the Act and be approved by the Secretary. Finally, a USDA-accredited certifying agent must accept the certification decisions made by another USDA-accredited certifying agent as its own.

(2) Potential Duplication Between the Accreditation and SOP Review Process. Some commenters asked about possible duplication between the process for reviewing SOP's and the process of accreditation review. These commenters have asked the NOP to eliminate any duplication that may exist between the two review processes. The NOP will be conducting a review process for SOP's and a separate review process for accrediting State and private certifying agents. The two reviews are different. The SOP review is the evaluation of SOP compliance with the Act and the NOP regulations. If approved, the SOP becomes the NOP standards for the particular State with which all certifying agents operating in that State must comply. Approved SOP's must be in compliance with the Act and the NOP regulations. They cannot have weaker standards than the NOP. States can have more restrictive requirements than the NOP if approved by the Secretary.

The accreditation review is an evaluation of the ability of certifying agents to carry out their responsibilities under the NOP. This review is a measure of the competency of certifying agents to evaluate compliance to national organic standards. Certifying agents will not be unilaterally establishing regulations or standards related to the certification of organic products. They will only provide an assessment of compliance.

Thus, SOP reviews and accreditation reviews are separate evaluations of different procedures. We acknowledge some of the information for the two evaluations may be similar; e.g., compliance procedures. The reviews do not duplicate the same requirements. However, the NOP envisions working with States to ensure documentation is not duplicated.

(3) Scope of Enforcement by States. A number of State commenters have requested clarification on the proposed rule provision specifying that approved SOP's must assume enforcement obligations in their State for the requirements of the NOP and any additional requirements approved by the Secretary. These commenters have indicated that they remain uncertain as to what is expected by the term, "enforcement obligation."

Approved SOP's will have to administer and provide enforcement of the requirements of the Act and the regulations of the NOP. The administrative procedures used by the State in administering the approved SOP should have the same force and effect as the procedures use by AMS in administering this program. This final rule specifies that the requirements for environmental conditions or for special production and handling practices are necessary for establishing more restrictive requirements. These factors establish our position that a State must agree to incurring increased enforcement responsibilities and obligations to be approved as an SOP under the NOP. For instance, a State with an approved organic program will oversee compliance and appeals procedures for certified organic operations in the State. Those procedures must provide due process opportunities such as rebuttal, mediation, and correction procedures. Once approved by the Secretary, the State governing official of the SOP must administer the SOP in a manner that is consistent and equitable for the certified parties involved in compliance actions.

(4) SOP's That Do not Certify and NOP Oversight. A few commenters requested that the NOP develop new provisions to include State programs that have organic regulations but do not conduct certification activities. These commenters argue that any SOP that has a regulatory impact on organic producers, regardless of whether or not the program includes certification, be approved by the Secretary.

This regulation, in section 205.620(b), provides for NOP oversight of SOP's that do not conduct certification activities.

(5) State's Use of Private Certifying Agents. Some commenters have requested that the NOP provide clarification of the proposed rule sections 205.620 through 205.622 on how these sections will affect States that delegate certification activities to private certifying agents. These commenters asked how the NOP intends to oversee this type of State activity.

The NOP intends to give considerable latitude to States in choosing the most appropriate system or procedures to structure their programs. This may include a State establishing its own certifying agent or relying on private certifying agents. However, States will not be accrediting certifying agents operating in their State. Accreditation of all certifying agents operating in the United States is the responsibility of USDA. Establishment of a single national accreditation program is an essential part of the NOP. As stated elsewhere in this final rule, any accreditation responsibilities of a State's current organic program will cease with implementation of this program. Pursuant to the Compliance provisions of this subpart, the governing State official charged with compliance oversight under the SOP may investigate and notify the NOP of possible compliance violations on the part of certifying agents operating in the State. However, the State may not pursue compliance actions or remove accreditation of any certifying agent accredited by the Secretary. That authority is the sole responsibility of the Secretary. If more restrictive State requirements are approved by the Secretary, we will review certifying agent qualifications in the State, as provided by section 205.501(a)(20), and determine whether they are able to certify to the approved, more restrictive requirements. Our accreditation responsibilities include oversight of both State and private certifying agents, including any foreign certifying agents that may operate in a State.